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Prior Inspection of Records During Examination Before Trial Does Not Preclude Reinspection by Discovery Under CPLR 3120

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Problem II:—Disclosure of statements by witnesses in the possession of an adverse party.

In his notice to discover pursuant to CPLR 3120, plaintiff in the instant case requested inspection of all statements obtained prior to the commencement of the action by defendants or their agents from persons possessing knowledge of the accident. The court did not presently decide what it termed the "perennially thorny problem" of obtaining statements by witnesses, but it held that the notice to discover under CPLR 3121 requires specification "with reasonable particularity" of the documents sought to be discovered. Since plaintiff's "blunderbuss" notice to discover all statements by witnesses did not specify which statements he sought, he should first ascertain through depositions or otherwise what statements were made and then specify those he wishes to inspect. It is only when a party has specified the documents he seeks that the court can intelligently decide whether the statements are immune from disclosure because they are privileged matter, attorney's work product, or material prepared for litigation.¹⁴⁶

Conclusion

The court's resolution of each problem, discovery of a list of unspecified witnesses and discovery of all statements of witnesses, was based on the same theory. As the court said: "While the policy of the CPLR is to broaden disclosure procedures, discovery should not be permitted to substitute for independent investigation of facts which are equally available to both parties."¹⁴⁷ However, the court continued: "we do not suggest that under the CPLR discovery and inspection can be obtained only after the taking of oral or written depositions."¹⁴⁸ The court indicated that under the circumstances of the instant case, the taking of depositions was necessary in order to ascertain which witnesses were material to plaintiff's case and to identify documents in the possession and control of an adverse party.

Prior inspection of records during examination before trial does not preclude reinspection by discovery under CPLR 3120.

In *Lindenman v. Thompson*,¹⁴⁹ a personal injury action, defendant moved pursuant to CPLR 3120 for discovery and inspection of the plaintiff's income tax returns. Plaintiff in opposition to defendant's motion contended that because these

¹⁴⁶ CPLR 3101.

¹⁴⁷ *Rios v. Donovan*, *supra* note 138, at 413, 250 N.Y.S.2d at 822.

¹⁴⁸ *Id.* at 414, 250 N.Y.S.2d at 823.

¹⁴⁹ 43 Misc. 2d 30, 249 N.Y.S.2d 919 (Sup. Ct. 1964).

returns were produced at plaintiff's examination before trial.¹⁵⁰ defendant had waived his rights to a subsequent discovery and inspection of them. The court held that under the CPLR a party does not waive his right to a subsequent discovery of records which he has previously inspected during an examination before trial unless the later inspection would amount to an abuse under CPLR 3103(a).¹⁵¹ The mere request for another inspection is not such an abuse.

Under the CPA discovery and inspection could be had only by court order.¹⁵² Most courts would not grant general discovery and inspection if a pre-trial examination and the limited discovery and inspection available therein could achieve the same results.¹⁵³ Even where only discovery and inspection were sought, some courts went so far as to hold that an examination before trial, with production of records, was still a prerequisite to general discovery. After this was done, discovery could be had only upon a showing of inadequacy of the inspection permitted during the examination before trial.¹⁵⁴

Under the CPLR discovery and inspection may now be had on notice alone.¹⁵⁵ It would seem, therefore, that an examination before trial is not a prerequisite to discovery and inspection. Nor is it necessary to prove the inadequacy of the prior inspection taken during a pre-trial examination, before discovery may be had.¹⁵⁶ Accordingly, the previous inspection of records during an examination before trial should not preclude a subsequent inspection through the discovery procedure unless the subsequent inspection is sought merely to annoy and delay.¹⁵⁷ As the court in the instant case said: "A particular disclosure device is not

¹⁵⁰ CPLR 3111.

¹⁵¹ CPLR 3103(a) provides: "The court may at any time on its own initiative, or on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

¹⁵² CPA § 324; *Gross v. Price*, 2 App. Div. 2d 707, 153 N.Y.S.2d 424 (2d Dep't 1956).

¹⁵³ *CARMODY-FORKOSH*, NEW YORK PRACTICE § 687, at 635 (8th ed. 1963). This may still be true under the CPLR. See *Rios v. Donovan*, 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964). This case is treated in another part of the *Biannual Survey*.

¹⁵⁴ *City Messenger Serv. of Hollywood, Inc. v. Powers Photoengraving Co.*, 7 App. Div. 2d 213, 181 N.Y.S.2d 888 (1st Dep't 1959); 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3120.22 (1964).

¹⁵⁵ CPLR 3120.

¹⁵⁶ 3 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 154; *CARMODY-FORKOSH*, *op. cit. supra* note 153; but see *Rios v. Donovan*, *supra* note 153.

¹⁵⁷ CPLR 3103(a).

intended as a predicate to or limitation upon another such device." ¹⁵⁸

In this connection practitioners should distinguish between the limited discovery allowed during the course of an examination before trial through the production of books and records under CPLR 3111 and the general discovery of documents and other items allowed under CPLR 3120. The scope of inspection allowed under the two provisions differs. Inspection during a deposition under 3111 must generally bear a relationship to the immediate testimony then being adduced. On the other hand, inspection under 3120 envisions a general discovery encompassing the merits of the entire case.¹⁵⁹ It is evident that the production of records at a pre-trial examination, where the inspection is only incidental to the examination, should not preclude a subsequent broader, and more detailed inspection under 3120. However, where an examination before trial is already in progress orderly procedure mandates that the examination be concluded before a general discovery is requested.¹⁶⁰

The decision of the court in the instant case is consistent with the general policy of article 31 which seeks to provide full and fair disclosure with resort to the courts only in the event of abuse. If a party for some reason is unable to obtain the information sought from records produced at the examination before trial, it certainly is not an abuse to allow him to obtain such information through a subsequent discovery. As the CPLR Revisers have stated: "Parties are not limited in their choice to one or more disclosure devices. Nor is there any express limit on the number of times a device may be used. However, abuse either willful or due to incompetence, may be checked by [CPLR 3103]" ¹⁶¹

¹⁵⁸ *Lindenman v. Thompson*, 43 Misc. 2d 30, 31, 249 N.Y.S.2d 919, 921 (Sup. Ct. 1964).

¹⁵⁹ *CARMODY-FORKOSCH*, NEW YORK PRACTICE § 687, at 635 (8th ed. 1963); *WACHTELL*, NEW YORK PRACTICE UNDER THE CPLR 239 (1964); see *Levy v. Whipple*, 10 Misc. 2d 752, 173 N.Y.S.2d 475 (Sup. Ct. 1958).

¹⁶⁰ 3 *WEINSTEIN, KORN & MILLER, op. cit. supra* note 154. Another distinction between CPLR 3111 and 3120 appears to be that 3111 alone can be used to compel the production of documents and things pre-trial from a non-party witness, while 3120 appears to be limited to discovery of things in possession, custody, or control of a party. *But see Williams v. Sterling Estates, Inc.*, 41 Misc. 2d 692, 245 N.Y.S.2d 777 (Sup. Ct. 1963) [allowing discovery against a non-party witness under CPLR 3120 upon a showing of special circumstances under CPLR 310(a)(4)]; *A Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 440 (1964). 7B *McKINNEY'S CPLR 3120*, supp. commentary 30 (1964).

¹⁶¹ 1957 N.Y. LEG. DOC. NO. 6(b), FIRST PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 121.